2. The necessities of modern legislation make occasional delegation of fractional portions of the legislative power imperative.

3. The courts do, in fact, recognize such delegations when they appear sufficiently necessary, but are reluctant to call them by their true name.

4. Some courts have at least suggested that a modification of the original doctrine is essential so that in proper cases sensible results may be reached in a logical manner.

It would be presumptuous to attempt to enunciate any new theory of constitutional law on the basis of the foregoing extremely sketchy review of the authorities, but it is neither presumptuous nor academic to quote the words with which Justice Timlin concluded his address, above cited. He said: "I should say in conclusion that whether or not a statute is invalid because of an unconstitutional delegation of legislative power depends upon the extent to which the power usually exercised by the legislature is attempted to be delegated; that delegation to a greater extent is permissible where without such delegation it is impossible to make the statute effectual for an exercise of legislative power otherwise clearly constitutional; that the validity of such a statute does not depend upon the conventional or legal name of that fraction of legislative power delegated, nor upon its intrinsic nature, but *rather upon the necessity for such delegation* and the existence of a general rule of statute law covering the subject in general terms, to which rule the delegated power is an aid or adjunct."

If this principle had been applied to the proposed Massachusetts legislation in the principal case, it can hardly be doubted that an opposite result would have been reached. It is true that the attempted delegation is of an unusual sort and should be carefully scrutinized for that reason. But when one considers that in the Eighteenth Amendment the state and federal systems are given "concurrent power" for its enforcement, that the federal laws will be in force in Massachusetts in any event, whether they are adopted as state laws or not, that in view of the peculiar difficulties of prohibition enforcement it is particularly desirable that laws promoting that end should be uniform in application, it would seem to be highly desirable, if not a practical necessity, that the sheriff and the marshal act under like laws. This result could be accomplished by successive enactments by the General Court, but all considerations of convenience seem to justify an automatic injection of the federal laws into the state system. It should be noted that the opinion is written on proposed and not enacted legislation. It is not improbable that, had the legislature actually passed the measure before the question of its constitutionality arose, the court would have found a way to avoid holding it unconstitutional. E. B. S.

DUE PROCESS—EQUAL PROTECTION—DENIAL OF THE INJUNCTIVE REMEDY. —During the past two decades the power of a court of equity to issue an injunction in labor disputes has been inveighed against in the bitterest terms. In two recent cases the Supreme Court of the United States has been confronted with the problems raised by the injunction, and in both instances

has held the injunction a valid remedy against picketing, which was not in fact peaceable; in the first case, notwithstanding the Clayton Act, and in the second, despite a state statute forbidding the use of injunction in labor disputes. *American Steel Foundries* v. *Tri-City Central Trades Council et al.*, 42 Sup. Ct. Rep. 72, brought to the attention of the court a labor dispute involving picketing, to which it applied § 20 of the Clayton Act, passed while the case was pending in the Circuit Court of Appeals, and held that so-called "peaceful picketing" was a contradiction in terms, saying: "In the present case the three or four groups of picketers were made up of from four to twelve in a group. They constituted the picket line. Each union * * * had several representatives on the picket line, and assaults and violence ensued. They began early and continued from time to time during the three weeks of the strike after the picketing began. All information tendered, all arguments advanced and all persuasion used under such circumstances were intimidation. They could not be otherwise. It is idle to talk of peaceful communication in such a place and under such conditions. The numbers of the pickets in the groups constituted intimidation. The name 'picket' indicated a militant purpose, inconsistent with peaceable persuasion. * * * Our conclusion is that picketing thus instituted is unlawful and cannot be peaceable, and may be properly enjoined by the specific term because its meaning is clearly understood in the sphere of the controversy by those who are parties to it."

Truax v. *Corrigan*, 42 Sup. Ct. Rep. 124, involved the constitutionality of a statute enacted in 1913 by the legislature of Arizona, specifically excepting disputes between employees and employers from injunction process and declaring: "No restraining order or injunction shall be granted by any court of this state, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment. * * *" Ariz., 1913, R. S., § 1462. Union leaders had ordered a strike of employees in plaintiffs' restaurant in Bisbee and then had placed pickets outside the place of business, displayed banners, denounced plaintiffs as unfair, and had urged customers to stay away, intimating injury to future patrons. The result of the campaign was to reduce the business from one of more than $55,000 a year to one of $12,000. Plaintiffs asked for an injunction, setting up the insolvency of defendants and alleging that actions for damages would involve a multiplicity of suits and that the Arizona statute was of no effect, being unconstitutional in that it deprived plaintiffs of their property without due process and denied them the equal protection of the laws. Defendant's demurrer was sustained, and this judgment was affirmed by the supreme court of Arizona. In the United States Supreme Court the decision was reversed by a five to four decision, Mr. Chief Justice Taft writing the majority opinion. The first question considered was whether the statute amounted to a taking of property without due process. The court held that the business was a property right, and that defendants'

acts were illegal, saying: "Violence could not have been more effective. It was moral coercion by illegal annoyance and obstruction, and it thus was plainly a conspiracy." The decision on this point seems to rest on the fact that plaintiffs were without legal remedy as a practical matter and that because they were thus without practical protection the court would not be overly concerned about purely technical remedies utterly valueless to plaintiffs. The Chief Justice says: "It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of *all real remedy,* is wholly at variance with those principles. * * *To give operation to a statute whereby serious losses inflicted by such unlawful means are in effect made remediless is, we think, to disregard fundamental rights of liberty and property and to deprive the person suffering the loss of due process of law."

The court construes the opinion of the supreme court of Arizona as withholding from plaintiffs *all* remedy for the wrongs they suffered. Then the court proceeds: "If, however, contrary to such construction only the equitable relief of injunction is withheld, have plaintiffs been denied the equal protection of the laws?" and answers in the affirmative, saying: "If, as is asserted, the granting of equitable remedies falls within the police power and is a matter which the legislature may vary as its judgment and discretion shall dictate, this does not meet the objection under the equality clause, which forbids the granting of equitable relief to one man and the denying of it to another under like circumstances and in the same territorial jurisdiction."

The classification is also objected to, the Chief Justice saying: "It seems a far cry from classification on the basis of the relation of employer and employee in respect of injury received in course of employment to classification based on the relation of an employer, not to an employee, but to one who has ceased to be so, in respect of torts thereafter committed by such ex-employee on the business and property right of the employer."

The minority opinions written by Justice Pitney (Justice Clark concurring), Justice Brandeis and Justice Holmes, raise the objection that the process of injunction is a measure of police regulation, a mere rule of law in which no person has a vested right, and subject to change by the legislature at will. In regard to the guaranty of equal protection Justice Pitney observes: "Examination shows that it does not discriminate against the class to which plaintiffs belong in favor of any other. There is no discrimination as against them; others situated like them are accorded no greater right to an injunction than is accorded to them." The reasonableness of the classification does not trouble Mr. Justice Holmes. Justice Brandeis' dissenting opinion, fortified by a wealth of authority and historical refer-

ence, reviews the economic struggle between employer and employee during the past century, and concludes that the denial of the injunction was merely a denial of a rule of law in which planitiff had no vested right.

In commenting on the decision it would seem superfluous to do more than call attention to the arguments of the members of the court. They are the best commentaries on the case that can be given; and yet, in spite of a thorough agreement with the result which the majority of the court reached, it would seem as though the argument of the minority is unanswerable—the remedy by injunction is a mere method of procedure, just a rule of law, and subject to change and modification by the legislature as it sees fit. There is a hint to the contrary by Mr. Justice Pitney, however, in *Arizona Employers' Liability Cases,* 250 U. S. 400, 421, where the court says: "Rules of law are not placed by the Fourteenth Amendment beyond the reach of the state's power to alter them through legislation designed to promote the general welfare, so long as it does not interfere arbitrarily and unreasonably and in defiance of natural justice." The Supreme Court has held that a state may deprive a person of a right to a trial by a common law jury without violating due process or equal protection. *Maxwell* v. *Dow,* 176 U. S. 581. Is the right to an injunction more sacred? Certainly the process of injunction cannot claim the antiquity of trial by jury; may it not also be denied by a state? If we are to take the case on its facts and simply characterize the entire proceeding which the decision had to meet as arbitrary and contrary to the principles of justice, the decision of the court may perhaps be upheld, as in the tax case of *Norwood* v. *Baker,* 172 U. S. 269. But if the case is an authority for the proposition that the legislature cannot change or prohibit the use of the injunction in certain cases, it is indeed difficult to understand the reasoning of the court and to avoid the logic of Mr. Justice Pitney in his dissent.

In the New York supreme court an injunction was issued at the request of a labor union against an employer, *International, etc., Union* v. *Cloak, etc., Manufacturers' Association,* N. Y. Supreme Court, Jan. 11, 1922, thus putting the shoe of government by injunction on the capitalist foot, and giving labor the benefit of a law so often denounced. But regardless of this decision's converting the unions to the use of the injunction, the majority of the United States Supreme Court have no doubt as to the legality and efficacy of the injunction in controversies between employer and employee.

W. C. O'K.

WORKMEN'S COMPENSATION—EMPLOYER'S RIGHT TO SUBROGATION AND EFFECT OF PAYMENT BY WRONGDOER.—Nice questions are continually arising under the Workmen's Compensation Acts with reference to the employer's right to be subrogated to the employee's rights against third persons, and the effect of payment by the wrongdoer to the employee. A recent Iowa case, *Renner* v. *Model Laundry, Cleaning & Dyeing Co.* (1921), 184 N. W. 611, presents the problem very pointedly. In that case the plaintiff's intes-